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Obama Administration won't appeal court's decision on pesticide applications

By Sara Wyant

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The U.S. Justice Department will not appeal a federal court decision that could eventually require farmers to seek permits from the Environmental Protection Agency (EPA) for all pesticide applications and open the door to citizen lawsuits. However, the National Cotton Council (NCC), CropLife America, and other groups have requested that the Sixth Circuit Court review the decision.

"I am disappointed at the Administration's decision to not seek a rehearing -- but I am equally confident that the filing of a petition for rehearing which we at CropLife have supported is very well constructed and makes a solid case on behalf of agriculture's interests," says Jay Vroom, President and CEO of CropLife America. "There is no doubt that if the January ruling stands, it will be a serious and unnecessary impact on crop production and a wide range of other essential pesticide users. We intend to fully press our position to the 6th Circuit and prevail."

The U.S. Court of Appeals 6th Circuit issued the decision on the case, National Cotton Council vs. EPA, in January, nullifying an earlier EPA ruling that allowed chemical applications to be regulated under existing federal pesticide regulations. Instead, the pesticides applied in or near waterways will now be classified under the Clean Water Act. The change, if allowed to stand, carries significant implications.

"The impact of this case is staggering," says Gary Baise, a former EPA official who is now an attorney with Olsson, Frank and Weeda. "Twice before Courts in the U.S. have issued rulings which would require a producer of crops to obtain a Clean Water Act permit if spray drift or residual material was found in a water of the state or the United States. On both of these occasions, Congress recognized the danger and folly of allowing EPA to control the runoff of chemical pesticides and fertilizers from farmland caused by rainfall. In both cases, Congress had the good sense to exempt agricultural practices by enacting the irrigation return flow exemption and the agricultural storm water exemption. I would hope common sense would prevail on this third occasion; however, I am not hopeful given the composition of this Congress. The new administration in Washington is now in control of many of our banks and the auto companies. This case gives EPA the right to control our farms."

The National Pollutant Discharge Elimination System (NPDES) permitting program has long been used by EPA under the Clean Water Act (CWA) to regulate point source discharges of water contaminants, according to CropLife America. Congress exempted agricultural storm water runoff from nonpoint sources from the CWA's permitting program and EPA's 2007 rule similarly exempted pesticide applications that were properly made. The court panel's decision overturned EPA's policy, ruling that pesticide applications made to, over, or near water bodies will require NPDES permits.

"If the panel's findings stand, scores of beneficial pest control activities necessary to maintaining the health and welfare of Americans could be subjected to lawsuits from activists claiming that the use of pesticides is prohibited under the Clean Water Act unless authorized by an NPDES permit," adds CLA's Vroom. "This is of great concern to mosquito control officials, farmers, and pest managers for forests, waterways, parks and numerous other situations."

"Aquatic pesticide applications - whether to control mosquitoes or aquatic weeds in irrigation canals or recreational waterways - are examples of high-value pesticide benefits that may be seriously impeded should the three judge panel decision stand," added Vroom.

In a March 6, 2009 letter, Agriculture Secretary Vilsack asked EPA Administrator Lisa Jackson to seek a rehearing and request reversal of the 6th Circuit's decision. Senate Agriculture Committee Chairman Tom Harkin, (D-IA) and Ranking Member Saxby Chambliss, (R-GA.), weighed in with a similar letter. But those requests were rebuffed.

EPA spokesperson Dave Ryan confirmed yesterday that the government will not be filing a petition to seek rehearing, but will request a two-year implementation plan.

"EPA recognizes the significant implications of the court decision, and the government will request two years for the necessary permits to be put in place. If the request is accepted by the court, water permits would not be required for another two years," explained Ryan.

"EPA will work closely with state water permitting programs to develop their permits and provide outreach and education on the issue," Ryan added. "EPA plans to work closely with states and the regulated and environmental communities in developing a general permit that is protective of the environment and public health."

But there's no guarantee that the court will allow a two-year delay, if the decision stands. Charlie Tebbutt of the Western Environmental Law Center, who argued the case for the environmental challengers, called EPA's two-year delay "troubling," but he added "I expect that the 6th Circuit will deny the request to keep an illegal rule in place. The court decision simply reinstates the law as it was before Bush's intervention in 2006 and numerous states had permits in place prior to the rule change.

"It will not be the great hardship that the pesticide industry has concocted. It is time to reinstate the full protections to our nation's rivers, lakes and streams envisioned by the Clean Water when it was passed in 1972" Tebbutt concluded.

While noting their appreciation for Vilsack's efforts with the EPA, American Farm Bureau Director of Public Policy Mary Kay Thatcher says: "We are very disappointed that EPA chose not to join us in seeking a re-hearing. If the courts don't re-hear the case, it will cause a tremendous amount of additional regulation for farmers by forcing them to get a permit that won't result in any additional benefit for the environment."